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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re J.R., a Person Coming Under The
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.R.,

Defendant and Appellant.

F057027

(Super. Ct. No. 05CEJ601076)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Martin Suits, Commissioner.

Candice L. Christensen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Vartabedian, Acting P.J., Cornell, J., and Gomes, J.

INTRODUCTION

Appellant, J.R., had an early adjudication for Penal Code section 288, subdivision (a). A subsequent petition was filed alleging three misdemeanors. Pursuant to a plea agreement, appellant admitted one count of driving with a suspended license. The appellant appealed in case No. F056470 from the juvenile court's order committing him to the Division of Juvenile Facilities (DJF).¹ While appellant's appeal was pending, DJF found appellant did not have a qualifying offense for commitment to its facilities. The juvenile court entered a new order dismissing appellant's misdemeanor petition and recommitted appellant to DJF. The appellant appeals those orders in the instant appeal.²

Appellant's opening brief challenged the trial court's interpretation of section 782. Appellant further argued the juvenile court erred in failing to state reasons for its decision to dismiss the petition and that it failed to account for all of appellant's custody credits. Respondent argues the juvenile court did not abuse its discretion under section 782 but concedes the latter two issues.

On this court's own motion, we ordered briefing by the parties on three additional issues: (1) whether the juvenile court had jurisdiction to modify its judgment while the first appeal was still pending before this court; (2) whether the juvenile court violated appellant's due process right to the benefit of his plea bargain when it dismissed the misdemeanor petition; and (3) whether the juvenile court abused its discretion under

¹ The juvenile court here referred to the California Youth Authority (CYA). DJF was formerly known as CYA. (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 37, fn. 2.) DJF was renamed by statutory enactment in 2005. (§§ 202, subd. (e)(5), 1000, 1703, subd. (c), & 1710, subd. (a).) The DJF is part of the Division of Juvenile Justice. (Gov. Code, §§ 12838, 12838.3, 12838.5, 12838.13.) DJF is referenced in statutes, such as sections 731 and 733, that formerly referred to CYA. (*In re N.D.* (2008) 167 Cal.App.4th 885, 890, fn. 2.) In this opinion, we will use the name DJF uniformly, even when referring to older cases and statutes.

² On May 11, 2009, we ordered this appeal coordinated with the first appeal, case No. F056470.

Welfare and Institutions Code section 782³ in dismissing the misdemeanor petition to increase the range of potential sanctions.

Appellant answers all three questions affirmatively. Respondent concedes the juvenile court did not have jurisdiction to modify its judgment while an appeal was pending before this court, but argues the juvenile court does have the authority to dismiss the misdemeanor petition pursuant to section 782, notwithstanding the plea agreement.

FACTS AND PROCEEDINGS

On October 25, 2006, a petition was filed pursuant to section 602 alleging appellant committed a felony by committing a lewd and lascivious act on a child under age 14 (Pen. Code, § 288, subd. (a)). After being advised of the consequences of his plea and waiving his rights, appellant admitted the offense on March 7, 2007.⁴ On April 17, 2007, the juvenile court placed appellant on deferred entry of judgment.⁵

On December 17, 2007, a new petition was filed alleging that appellant made a false report to a peace officer, a misdemeanor (Pen. Code, § 148.5, subd. (a), count one), drove a vehicle without a valid driver's license, a misdemeanor (Veh. Code, § 12500, subd. (a), count two), and misdemeanor possession of less than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b), count three). On January 7, 2008, appellant turned 18.

On March 24, 2008, the probation office sought a warrant for appellant's arrest for failing to complete programs for community service and sex offender treatment. The juvenile court issued a warrant for appellant's arrest.

³ Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

⁴ The factual basis for appellant's plea was that he placed one of his private parts on an eight-year-old victim.

⁵ Appellant had a prior adjudication on August 25, 2005 for a misdemeanor violation of receiving stolen property (Pen. Code, § 496, subd. (a)).

On April 17, 2008, while the arrest warrant was still outstanding, the juvenile court terminated appellant's deferred entry of judgment. On August 19, 2008, appellant was transported to Fresno County Jail. On September 12, 2008, the parties agreed appellant would admit count two of the misdemeanor petition, driving without a license, and the other two allegations would be dismissed.

The juvenile court advised appellant of his rights, which appellant acknowledged and waived, and explained the possible consequences of appellant's plea. These included being placed on probation, release to his parents, placement in a group or foster home, and because of the prior felony adjudication, placement in DJF. Appellant admitted count two.

The probation officer recommended appellant be committed to DJF for eight years two months. On October 14, 2008, the juvenile court found appellant's victim was particularly vulnerable, appellant took advantage of a position of trust, appellant was on probation when the offense was committed, and appellant voluntarily acknowledged wrongdoing at an early stage of the proceedings. The court committed appellant to DJF, setting his maximum period of confinement at eight years two months.

The juvenile court's commitment order to DJF was filed on October 14, 2008. On October 27, 2008, DJF sent a letter to the juvenile court informing it that appellant's most recent offense was not a qualifying offense under section 707, subdivision (b) and appellant could not be committed to DJF pursuant to section 733. Appellant's notice of appeal in case No. F056470, the appeal from the juvenile court's commitment order to DJF, was filed on November 7, 2008.

On December 11, 2008, the probation department filed an ex parte application to calendar a motion concerning appellant's eligibility for commitment to DJF. On December 15, 2008, the Fresno County District Attorney's Office filed a motion to dismiss the misdemeanor petition and to set aside appellant's admission of driving a vehicle without a valid license in the interests of justice pursuant to section 782. Appellant filed written opposition to the prosecution's motion on January 13, 2009.

On January 16, 2009, the juvenile court heard the prosecutor's motion to dismiss the misdemeanor petition. The prosecutor argued it was in the interests of justice to grant the motion. The juvenile court acknowledged it was unaware the change to the Welfare and Institutions Code would preclude it from committing appellant to DJF if appellant's most recent offense was a violation of Vehicle Code section 12500. The court characterized the legal problem as a mistake by the court and the prosecutor.

Defense counsel acknowledged that although a mistake may have been made, sections 782 and 733 barred a commitment to DJF where the last petition filed did not allege a qualifying offense. The juvenile court set aside appellant's admission of the Vehicle Code section 12500 offense and granted the prosecutor's motion to dismiss the misdemeanor petition. The court recommitted appellant to DJF pursuant to its original order of October 14, 2008. The court's commitment order to DJF was filed on January 20, 2009. Appellant filed a notice of appeal from the juvenile court's recommitment of him to DJF on January 26, 2009.

SECTION 733

Section 733, subdivision (c),⁶ expressly states that a juvenile shall not be committed to DJF if he or she "has been adjudged a ward of the court pursuant to section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code."

As we noted in the companion appeal, case No. F056470, appellant's most recent adjudication was for driving without a valid driver's license, a misdemeanor. Vehicle Code section 12500, subdivision (a) is not an enumerated offense in section 707, subdivision (b) or in Penal Code section 290.008, subdivision (c).⁷

⁶ Hereinafter we refer to section 733, subdivision (c) as section 733(c).

⁷ Penal Code section 290 was amended in 2007. Under either Penal Code section 290, subdivision (d)(3), the former statute, or Penal Code section 290.008, subdivision

Because the most recent offense attributable to appellant was a non-qualifying misdemeanor, we held in case No. F056410 the juvenile court erred in committing appellant to DJF. (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1467-1468 (V.C.).) In the instant appeal, we confront the questions of the juvenile court's jurisdiction, the effect of the plea agreement, and whether the juvenile court had the authority to dismiss the misdemeanor action under section 782.

JUVENILE COURT JURISDICTION PENDING APPEAL

The parties agree the juvenile court did not have jurisdiction to modify its judgment on a matter that was then pending on appeal before this court.

Where an appeal is duly taken from an appealable order, the effect on the appeal is to remove jurisdiction of the appeal from the trial court. The notice of appeal in a juvenile action invested the court of appeal "with jurisdiction of the subject matter and deprived the juvenile court of power or authority 'to move in conflict with such jurisdiction.'" (*Agnew v. Superior Court* (1953) 118 Cal.App.2d 230, 234 (*Angew*).)⁸

On November 7, 2008, appellant filed his first appeal from the juvenile court's original order. This was an appealable order. On January 16, 2009, the juvenile court dismissed the very misdemeanor petition this court was to review in the first appeal. The

(c), the current statute, Vehicle Code section 12500, subdivision (a) is not a described offense.

⁸ Section 800, subdivision (a) authorizes appeals in juvenile matters. The statute provides in relevant part that: "A judgment in a proceeding under section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment." Section 580, the predecessor statute to section 800, subdivision (b), analyzed by the *Agnew* court stated in nearly identical language to the current statute that the decree of a juvenile court declaring anyone to be a ward of the court, " 'may be appealed in the same manner as any final judgment,' . . . 'any subsequent order may be appealed from as from an order after judgment.' " (*Agnew, supra*, 118 Cal.App.2d at pp. 233-234.) The operative language of section 800, subdivision (a) and its predecessor, section 580, is equivalent and we find the *Agnew* court's jurisdictional analysis equally applicable to section 800, subdivision (a).

juvenile court lacked the jurisdiction or authority to do so. Because this case is being remanded for a new disposition, we do not end our analysis with the jurisdictional issue.

PLEA AGREEMENT

Appellant entered into a plea agreement on the misdemeanor petition whereby he would admit the driving a vehicle without a valid license allegation in return for the dismissal of the other two misdemeanor allegations. Respondent argues that because there was no agreement between the parties concerning the disposition of the misdemeanor petition, the juvenile court did not breach the plea agreement in dismissing the petition and committing appellant to DJF. We disagree.

In *V.C.*, *supra*, 173 Cal.App.4th at pages 1465-1466, the petition alleged the minor committed one felony and two misdemeanors. The prosecutor entered into a plea agreement with the minor in which he would admit a misdemeanor offense, indecent exposure (Pen. Code, § 314), that was DJF ineligible and he would receive level A placement. The minor later violated the terms of probation and the trial court granted the prosecutor's motion to dismiss the petition. The minor had a prior adjudication for a violation of Penal Code section 288, subdivision (a). (*V.C.*, *supra*, 173 Cal.App.4th at pp. 1461, 1466.)

The court in *V.C.* found that the minor had a due process right to the benefit of his plea bargain in the subsequent petition. Under the due process clause, when a plea rests on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, that promise must be fulfilled. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1465.)

The respondent argues the prosecutor here, unlike the prosecutor in *V.C.*, did not agree to a non-DJF disposition and that the two cases are therefore distinguishable.⁹ We find this argument unpersuasive. Although the parties did not agree to a particular

⁹ We note that the petition in *V.C.* included a felony allegation. The petition at issue here only alleged that appellant committed DJF ineligible misdemeanors.

disposition, the appellant agreed to admit one misdemeanor allegation in exchange for the dismissal of the other allegations. The promise of the prosecutor was that appellant would stand adjudicated of a misdemeanor offense. Appellant was entitled to the benefit of this bargain. Plea agreements in both juvenile and adult cases often do not include a provision for the final disposition or sentence.¹⁰

The respondent argues the juvenile court informed appellant that one potential disposition would be commitment to DJF and a commitment as long as eight years two months and did not breach the plea agreement in committing appellant there. The juvenile court's advisement, however, was legally incorrect in light of section 733(c). The apparent mistaken understanding of the statute by the juvenile court and the parties is, therefore, immaterial.

By operation of law, the juvenile court could not commit appellant to DJF once appellant's most recent adjudication was a misdemeanor. Although the appellant did not have a particular expectation concerning the final disposition of his case, neither did the prosecutor. Indeed, the prosecution did not have an expectation or a right under the plea agreement to enforce appellant's commitment to DJF. In dismissing the misdemeanor petition and rejecting appellant's admission of driving without a valid license, the juvenile court violated appellant's due process right to enforce the plea agreement.

SECTION 782 DISCRETION

Appellant contends the juvenile court abused its discretion under section 782 to dismiss the misdemeanor petition in the interests of justice. Respondent argues the recent case of *In re J.L.* (2008) 168 Cal.App.4th 43 (*J.L.*) interpreted section 782 to allow the juvenile court to dismiss a misdemeanor petition to increase the range of available sanctions.¹¹

¹⁰ We also reject respondent's argument that appellant received the benefit of his plea bargain because the other two misdemeanor counts remained dismissed.

¹¹ The parties agree that the juvenile court failed to comply with section 782 by failing to state reasons for dismissing the misdemeanor petition. Such an order is void

In *J.L.*, the minor admitted committing felony assault with a deadly weapon by means likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)), a section 707, subdivision (b) offense. (*J.L.*, *supra*, 168 Cal.App.4th at p. 49.) The minor admitted allegations in a subsequent petition that he committed felony attempted robbery (Pen. Code, §§ 664, 211, & 212.5, subd. (c)) and a weapon enhancement (Pen. Code, § 12022, subd. (b)(1)). (*J.L.*, *supra*, 168 Cal.App.4th at p. 50.) The juvenile court later allowed the minor to withdraw his admission of the weapon enhancement. The minor's admission of attempted robbery did not qualify as a section 707, subdivision (b) offense. (*J.L.*, *supra*, 168 Cal.App.4th at p. 51.)

Prior to the disposition of the minor's case, the prosecution sought to have the subsequent petition dismissed pursuant to section 782. The juvenile court granted the motion and committed the minor to DJF because his most recent remaining adjudication was for assault with a deadly weapon by means likely to cause great bodily injury, a qualifying section 707, subdivision (b) offense. (*J.L.*, *supra*, 168 Cal.App.4th at pp. 52-53.) *J.L.* held that the juvenile court could dismiss the petition alleging a non-DJF eligible offense in the interests of justice pursuant to section 782. (*J.L.*, *supra*, 168 Cal.App.4th at pp. 56-57.)

and without legal effect. (*In re Juan C.* (1993) 20 Cal.App.4th 748, 752-753.) Although respondent concedes this error, respondent contends the case can be remanded for the juvenile court to make the proper findings. In light of our holding, we find that regardless of the juvenile court's findings, it was barred from committing appellant to DJF.

Section 782 provides: "A judge of the juvenile court in which a petition was filed, at any time before the minor reaches the age of 21 years, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. The court shall have jurisdiction to order such dismissal or setting aside of the findings and dismissal regardless of whether the minor is, at the time of such order, a ward or dependent child of the court."

The juvenile court further erred in failing to account for all of appellant's custody credits. (*In re Eric J.* (1979) 25 Cal.3d 522, 533-536.)

V.C. came to a different conclusion. After finding that the minor had a due process right to the benefit of his plea bargain, *V.C.* held that the dismissal of the subsequent petition had not been made in the interests of justice, especially for the reason that the juvenile court was unaware of a change to the Welfare and Institutions Code. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1467.) *V.C.* distinguished its facts from *J.L.* on the basis that the plea agreement in *V.C.* was fully executed whereas in *J.L.*, the subsequent petition was dismissed during the disposition hearing. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1466, fn. 11.) Here, the plea agreement was not only fully executed, the jurisdiction of the case was with this court when the juvenile court tried to modify its judgment.

Justice Scotland authored a separate concurring opinion exploring the “interests of justice” and the legislative history of section 782. (*V.C.*, *supra*, 173 Cal.App.4th at pp. 1471-1472 (conc. opn. of Scotland, P.J.).) Allowing that an interpretation of the interests of justice could be made either for or against dismissing a non-DJF qualifying offense, Justice Scotland concluded the legislative history of section 782 revealed the purpose of the statute was intended only as a vehicle for terminating jurisdiction over a minor. In that context, it was error for a juvenile court to apply section 782 to avoid the statutory limitation of section 733(c) to commit a minor to DJF. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1472 (conc. opn. of Scotland, P.J.).)

We note that unlike *V.C.*, the court in *J.L.* did not analyze the effect of the minor’s plea agreement. For this reason, as well as *V.C.*’s careful consideration of the interplay between sections 733(c) and 782, we find *V.C.* to be the better reasoned authority and apply its holding here. Accordingly, we will reverse the orders of the juvenile court.

DISPOSITION

The juvenile court’s orders of January 16, 2009, revoking appellant’s plea to the misdemeanor petition, dismissing the misdemeanor petition, and recommitting appellant to DJF are reversed. On remand, the juvenile court is directed to reinstate the misdemeanor petition and the appellant’s admission of misdemeanor driving without a license (Veh. Code, § 12500, subd. (a).). Pursuant to section 733(c), the juvenile court

shall not commit the appellant to DJF. The juvenile court is directed to consider such other disposition as may be just, taking into account appellant's accrued custody credits.